INDEX.

UNITED STATES OF AMERICA.

IN THE DISTRICT COURT OF THE UNITED STATES, MIDDLE DISTRICT OF GEORGIA—COLUMBUS DIVISION.

Criminal No. 3688.

JORDAN JAMES SULLIVAN, an individual, trading as SULLIVAN'S PHARMACY,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appearances:

Mr. J. Madden Hatcher and Mr. Robert M. Arnold, Columbus, Georgia, Attorneys for Appellant.

Mr. John P. Cowart, United States Attorney, and Mr. Jack J. Gautier, Assistant United States Attorney, Macon, Georgia, Attorneys for Appellee.

APPEAL from the District Court of the United States for the Middle District of Georgia, Columbus Division, to the United States Circuit Court of Appeals for the Fifth Circuit, returnable at the City of New Orleans, Louisiana.

3 F. D. C. No. 16600.

In the District Court of the United States within and for the Middle District of Georgia, Columbus Division.

United States of America,

vs.

Jordan James Sullivan, an individual, trading as Sullivan's Pharmacy.

Information No. 3688.

September Term, 1945.

John P. Cowart, Attorney for the United States, in and for the Middle District of Georgia, who for the said United States in this behalf prosecutes, in his own proper person comes into Court on this 26th day of December, A. D., nineteen hundred and forty-five, and with leave of the Court first had and obtained, gives the Court here to understand and be informed, as follows, towit:

That the Abbott Laboratories, trading and doing business at North Chicago, State of Illinois, did, within the period from on or about November 25, 1943 to on or about March 15, 1944, ship in interstate commerce from North Chicago, State of Illinois, to Atlanta, State of Georgia, consigned to the Abbott Laboratories, a number of boxes, containing a number of bottles, each bottle containing a number of tablets of a drug within the meaning of the Act of Congress of June 25, 1938, known as the Federal Food, Drug and Cosmetic Act (52 Statutes at Large, 1040; 21 U. S. C. 321(g)(2));

That one of said bottles containing said drug, when shipped in interstate commerce, as aforesaid, was labeled,

marked and branded by means of a label affixed thereto bearing the following printed and graphic matter, to-wit:

1000 Tablets (Bisected)
Sulfathiazole
(2-sulfanilamidothiazole)
0.5 Gm. (7.7 grs.)
Abbott
List No. 3430

Caution—To be used only by or on the prescription of a physician.

Warning: In some individuals Sulfathiazole may cause severe tox eactions. Daily blood counts for evidence of anemia or leukopenia and urine examinations for hematuria are recommended.

Physicians should familiarize themselves with the use of this product before it is administered. A circular giving full directions and contraindications will be furnished upon request.

F5 Serial No. 311T237.

Abbott Laboratories,
North Chicago, Ill., U. S. A.

That thereafter, to-wit, on or about September 29, 1944, the said Abbott Laboratories at Atlanta, Georgia, did sell and deliver said bottle of said drug in the identical condition as when shipped in interstate commerce, as aforesaid, and labeled, marked and branded, as aforesaid to Jordan James Sullivan, an individual, operating under the name Lynwood Pharmacy, Columbus, Georgia, and the said Jordan James Sullivan transferred said bottle of

drug and caused said bottle of drug to be transferred to Sullivan's Pharmacy, Columbus, Georgia, a pharmacy owned and operated by said Jordan James Sullivan.

That on or about December 13, 1944, while a number of said tablets of said drug contained in said labeled bottle, as aforesaid, were being held for sale after shipment in interstate commerce, as aforesaid, at said Sullivan's Pharmacy the said Jordan James Sullivan did, at Columbus, Georgia, within the Columbus Division of the Middle Judicial District of Georgia and within the jurisdiction of this Court, then and there cause to be removed a quantity of said tablets of drug, to-wit, 12 tablets of said drug from said bottle labeled as aforesaid and sold and delivered, as aforesaid, and being held for sale as aforesaid, and did cause to be repacked said 12 tablets of said drug so removed into a box and did cause to be sold and disposed of the said box containing the said 12 tablets to one Joe P. Durham, solely upon the surrender by the said Joe P. Durham of money in payment therefor;

That said box into which said 12 tablets were repacked was labeled, marked and branded with the following written and graphic matter, and no other, to-wit:

Sulfothizal

That said act of causing the removal, repacking and disposal, as aforesaid, resulted in said 12 tablets of drug being misbranded within the meaning of said Act of Congress (21 U. S. C. 352(f)(1)), in that the labeling of said drug in said box failed to bear adequate directions for use, towit, in that the said box containing said 12 tablets of drug, bore no labeling containing directions for use;

That said act of causing the removal, repacking and disposal, as aforesaid, resulted in said drug in said box aforesaid being further misbranded within the meaning of said Act of Congress (21 U. S. C. 352(f)(2)), in that the labeling of said drug failed to bear such adequate warnings against use in those pathological conditions where its use may be dangerous to health, and against unsafe dosage and methods and duration of administration, in such manner and form, as are necessary for the protection of users, in that the said box containing said tablets of drug bore no labeling containing warnings against use in those pathological conditions where its use may be dangerous to health, and against unsafe dosage and methods and duration of administration;

That said act by said Jordan James Sullivan, the defendant herein, of causing the removal from said labeled bottle, repacking into said box labeled as aforesaid and disposing of said 12 tablets of said drug, as aforesaid, was an act done by said Jordan James Sullivan while said article of drug was being held for sale after shipment in interstate commerce, as aforesaid, which resulted in said 12 tablets of drug being misbranded, as aforesaid, in violation of said Act of Congress (21 U. S. C. 331(k));

All of which was and is contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Count II.

And the said Attorney for the United States, in manner and form as aforesaid, also gives the Court here to understand and be informed that the Abbott Laboratories, trading and doing business at North Chicago, State of Illinois, did, within the period from on or about November 25,

1943, to on or about March 15, 1944, ship in interstate commerce from North Chicago, State of Illinois, to Atlanta, State of Georgia, consigned to the Abbott Laboratories, a number of boxes, containing a number of bottles, each bottle containing a number of tablets of a drug within the meaning of the Act of Congress of June 25, 1938, known as the Federal Food, Drug and Cosmetic Act (52 Statutes at Large, 1040; 21 U. S. C. 321(g)(2));

That one of said bottles containing said drug, when shipped in interstate commerce, as aforesaid, was labeled, marked and branded by means of a label affixed thereto bearing the printed and graphic matter borne on the bottle label described in the first count of this information which description of said bottle label in said first count is, by reference, hereby incorporated in this count;

That thereafter, to-wit, on or about September 29, 1944, the said Abbott Laboratories at Atlanta, Georgia, did sell and deliver said bottle of said drug in the identical condition as when shipped in interstate commerce, as aforesaid, and labeled, marked and branded, as aforesaid to Jordan James Sullivan, an individual, operating under the name of Lynwood Pharmacy, Columbus, Georgia, and the said Jordan James Sullivan transferred said bottle of drug and caused said bottle of drug to be transferred to Sullivan's Pharmacy, Columbus, Georgia, a pharmacy owned and operated by said Jordan James Sullivan;

That on or about December 14, 1944, while a number of said tablets of said drug contained in said labeled bottle, as aforesaid, were being held for sale after shipment in interstate commerce, as aforesaid, at said Sullivan's Pharmacy the said Jordan James Sullivan did, at Columbus, Georgia, within the Columbus Division of the Middle Judicial District of Georgia and within the jurisdiction

of this Court, then and there remove a quantity of said tablets of drug, to-wit, 12 tablets of said drug from said bottle labeled as aforesaid, and sold and delivered, as aforesaid, and being held for sale as aforesaid, and did repack said 12 tablets of said drug so removed into a box and did cause to be sold and disposed of the said box containing the said 12 tablets to one Herbert McLeod, Jr., solely upon the surrender by said Herbert McLeod, Jr., of money in payment therefor;

That said box into which said 12 tablets were repacked was labeled, marked and branded with the following written and graphic matter, and no other, to-wit:

Sulfathiazole

That said act of removal, repacking and disposal, as aforesaid, resulted in said 12 tablets of drug being misbranded within the meaning of said Act of Congress (21 U. S. C. 352(f)(1)), in that the labeling of said drug in said box failed to bear adequate directions for use, to-wit, in that the said box containing said 12 tablets of drug, bore no labeling containing directions for use;

That said act of removal, repacking and disposal, as aforesaid, resulted in said drug in said box aforesaid being further misbranded within the meaning of said Act of Congress (21 U. S. C. 352(f)(2)), in that the labeling of said drug failed to bear such adequate warnings against use in those pathological conditions where its use may be dangerous to health and against unsafe dosage and methods and duration of administration in such manner and form, as are necessary for the protection of users, in that the said box containing said tablets of drug bore no labeling containing warnings against use in those pathological conditions where its use may be dangerous to health, and

against unsafe dosage and methods and duration of administration.

That said act by said Jordan James Sullivan, the defendant herein, of removing from said labeled bottle, repacking into said box and disposing of said 12 tablets of said drug, as aforesaid, was an act done by said Jordan James Sullivan while said article of drug was being held for sale after shipment in interstate commerce, as aforesaid, which resulted in said 12 tablets of drug being misbranded, as aforesaid, in violation of said Act of Congress (21 U. S. C. 331(k));

All of which was and is contrary to the form of the Statute in such case made and provided and against the peace and dignity of the United States of America.

JOHN P. COWART,
United States Attorney for the
Middle District of Georgia.

Georgia,
Bibb County.

Comes now John P. Cowart, United States Attorney, who on oath deposes and says that the facts and things alleged in the foregoing criminal information are true and correct, to the best of his knowledge and belief.

JOHN P. COWART.

Sworn to and subscribed before me, this the 31 day of Dec., 1945.

WALTER F. DOYLE,
Deputy Clerk.

ORDER.

The foregoing information read and considered. Let the same be filed.

Further Ordered that copy of this criminal information be served upon the defendant named therein, and that the said defendant be and appear in the United States District Court for the Middle District of Georgia, Columbus Division, Columbus, Georgia, at 9:00 o'clock A. M., on the first Monday in March, 1946, to answer the charges contained therein.

This the 31st day of Dec., 1945.

T. HOYT DAVIS,
United States Judge.

Back or Cover of Information with Plea and Judgment.

PLEA.

Filed January 2nd, 1946.

* * * * * * * *

I, Jordan James Sullivan, having been advised of my Constitutional rights, and having had the charges herein stated to me, plead not guilty in Open Court, this 2 day of Sept., 1946.

J. MADDEN HATCHER,
Attorney for Jordan James Sullivan.

11 MOTION TO DISMISS.

(Title Omitted.)

Now comes Jordan James Sullivan, the Defendant in the above stated case, and before pleading to the merits of the above information, filed against him by the United States Attorney, moves the Court to dismiss and quash the information for the following reasons:

1. The allegations of said information are insufficient as a matter of law to constitute any offense against any of the laws of the United States of America.

2. It affirmatively appears from the allegations of said information that the alleged acts of this Defendant were not in interstate commerce, and were beyond the legislative power of Congress to regulate or control or punish.

3. Properly construed, Sections 331 (k), 352 (f) (1) and 352 (f) (2) of Title 21 U. S. C. only apply to misbranding in interstate commerce.

4. If Section 331 (k) of Title 21 U. S. C. is construed as applying to the alleged acts of this Defendant, then said section is unconstitutional, null and void, and in violation of the Tenth Amendment to the Constitution of the United States of America, which provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People", in that said section is beyond the legislative power of the Congress and is an invasion of the reserved police powers of the several States.

Wherefore, this Defendant prays that this motion be sustained and said information against him be dismissed and quashed and that he be discharged.

J. MADDEN HATCHER,
Attorney for Jordan James Sullivan, Defendant.

Filed February 8, 1946.

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OPINION.

(Title Omitted.)

DAVIS, District Judge:

This is a criminal prosecution by information in two counts,[1] charging violations of the Federal Food, Drug, and

[1] Count I (charging part):

"That the Abbott Laboratories, trading and doing business at North Chicago, State of Illinois, did, within the period from on or about November 25, 1943 to on or about March 15, 1944, ship in interstate commerce from North Chicago, State of Illinois, to Atlanta, State of Georgia, consigned to the Abbott Laboratories, a number of boxes, containing a number of bottles, each bottle containing a number of tablets of a drug within the meaning of the Act of Congress of June 25, 1938, known as the Federal Food, Drug and Cosmetic Act (52 Statutes at Large, 1040; 21 U. S. C. 321(g)(2));

"That one of said bottles containing said drug when shipped in interstate commerce, as aforesaid, was labeled, marked and branded by means of a label affixed thereto bearing the following printed and graphic matter, to-wit:

1000 Tablets (Bisected)
Sulfathiazole
(2-sulfanilamidothiazole) 0.5 gm. (7.7 grs.)
Abbott—List No. 3430

"Caution—To be used only by or on the prescription of a physician.

Warning: In some individuals Sulfathiazole may cause severe toxic reactions. Daily blood counts for evidence of anemia or leukopenia and urine examinations for hematuria are recommended. Physicians should familiarize themselves with the use of this product before it is administered. A circular giving full directions and contraindications will be furnished upon request.

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Abbott Laboratories.
North Chicago, Ill., U. S. A.

"That thereafter, to-wit, on or about September 29, 1944, the said Abbott Laboratories at Atlanta, Georgia, did sell and deliver said bottle of said drug in the identical condition as when shipped in interstate commerce, as aforesaid, and labeled, marked and branded, as aforesaid to Jordan James Sullivan, an individual, operating under the name Lynwood Pharmacy, Columbus, Georgia, and the said Jordan James Sullivan transferred said bottle of drug and caused said bottle of drug to be transferred to Sullivan's Pharmacy, Columbus, Georgia, a pharmacy owned and operated by said Jordan James Sullivan;

"That on or about December 13, 1944, while a number of said tablets of said drug contained in said labeled bottle, as aforesaid, were being held for sale after shipment in interstate commerce, as aforesaid, at said Sullivan's Pharmacy the said Jordan James

Cosmetic Act (21 U. S. C. 301 et seq.). It is alleged in each count, in substance, that a drug manufacturer in North Chicago, Illinois, shipped in interstate commerce to its distributor in Atlanta, Georgia, a bottle containing 1000 Sulfathiazole tablets; that the distributor thereafter sold and delivered said bottle of tablets to the defendant, the owner of drug stores in Columbus, Georgia; that while

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Sullivan did, at Columbus, Georgia, within the Columbus Division of the Middle Judicial District of Georgia and within the jurisdiction of this Court, then and there cause to be removed a quantity of said tablets of drug, to-wit, 12 tablets of said drug from said bottle labeled as aforesaid and sold and delivered, as aforesaid, and being held for sale as aforesaid, and did cause to be repacked said 12 tablets of said drug so removed into a box and did cause to be sold and disposed of the said box containing the said 12 tablets to one Joe P. Durham, solely upon the surrender by the said Joe P. Durham of money in payment therefor;

"That said box into which said 12 tablets were repacked was labeled, marked and branded with the following written and graphic matter, and no other, to-wit:

Sulfothizal

"That said act of causing the removal, repacking and disposal, as aforesaid, resulted in said 12 tablets of drug being misbranded within the meaning of said Act of Congress (21 U. S. C. 352(f)(1), in that the labeling of said drug in said box failed to bear adequate directions for use, to-wit, in that the said box containing said 12 tablets of drug, bore no labeling containing directions for use;

"That said act of causing the removal, repacking and disposal, as aforesaid, resulted in said drug in said box aforesaid being further misbranded within the meaning of said Act of Congress (21 U. S. C. 352(f)(2)), in that the labeling of said drug failed to bear such adequate warnings against use in those pathological conditions where its use may be dangerous to health, and against unsafe dosage and methods and duration of administration, in such manner and form, as are necessary for the protection of users, in that the said box containing said tablets of drug bore no labeling containing warnings against use in those pathological conditions where its use may be dangerous to health, and against unsafe dosage and methods and duration of administration;

"That said act by said Jordan James Sullivan, the defendant herein, of causing the removal from said labeled bottle, repacking into said box labeled as aforesaid and disposing of said 12 tablets of said drug, as aforesaid, was an act done by said Jordan James Sullivan while said article of drug was being held for sale after shipment in interstate commerce, as aforesaid, which resulted in said 12 tablets of drug being misbranded, as aforesaid, in violation of said Act of Congress (21 U. S. C. 331 (k))."

Count II similar to Count I, except as to name of purchaser and relating to "Sulfathiazole" rather than "Sulfothiazal".

the tablets in said bottle were being held for sale at one of the defendant's drug stores, after shipment in interstate commerce, the defendant caused 12 tablets to be removed from the bottle and placed into a box and disposed of by sale; that the box into which the tablets were placed and which was sold bore only the label "Sulfothiazal", as described in Count One and "Sulfathiazole", as described in Count Two; that the act of removing, repacking, and disposal resulted in the drug being misbranded in two different respects under the Federal Food, Drug and Cosmetic Act.

It is charged that these acts constitute violations of Section 301(k) of the Act, (21 U. S. C. 331 (k)). The pertinent provision of this section of the Act is as follows:

"Section 301 (21 U. S. C. 331): "The following acts and the causing thereof are hereby prohibited: * * * (k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to a, * * * drug * * *, if such act is done while such article is held for sale after shipment in interstate commerce and results in such article being misbranded."

The defendant filed a Motion to Dismiss setting forth four grounds: (1) the allegations of the information are insufficient as a matter of law to constitute any offense against the laws of the United States; (2) the alleged acts of the defendant were not in interstate commerce and were beyond the power of Congress to regulate, control, or punish; (3) the applicable provisions of the law only apply to misbranding in interstate commerce; (4) that if section 301(k) of the Act is construed as applying to the alleged acts of the defendant, said section is unconstitutional as

being beyond the legislative power of Congress and an invasion of the reserved police powers of the states.

We will consider in this opinion

(1) Whether Section 301(k) of the Act is a lawful exercise by Congress of its powers under the commerce clause of the Constitution; and

(2) Whether the acts of the defendant alleged in the information are cognizable under this section of the Act.

(1)

The Federal Food, Drug and Cosmetic Act (passed in 1938) and its predecessor, the Food and Drug Act of 1906, have been held to be lawful exercises by Congress of its power under the commerce clause of the Constitution. In *Hipolite Egg Co. v. United States*, 220 U. S. 45 (1911), in speaking of the 1906 Act, the Court said at p. 57:

"The statute rests, of course, upon the power of Congress to regulate interstate commerce, and, defining that power, we have said that no trade can be carried on between the States to which it does not extend, and have further said that it is complete in itself, subject to no limitations except those found in the Constitution."

In *United States v. Dotterweich*, 320 U. S. 277 (1943), a case under the 1938 Act, the Court said at p. 280:

"The Food and Drugs Act of 1906 was an exertion by Congress of its power to keep impure and adulterated food and drugs out of the channels of commerce. By the Act of 1938, Congress extended the range of its control over illicit and noxious articles and stiffened the penalties for disobedience."

It is well settled that congressional authority under the commerce clause includes the power to regulate intrastate activities which "affect" interstate commerce or which are in the "flow" of interstate commerce. It was said in *Oklahoma v. Atkinson*, 312 U. S. 508, 526 (1941):

"As repeatedly recognized by this Court from M'Culloch v. Maryland, 4 Wheat. 316, to United States v. Darby, 312 U. S. 100, the exercise of the granted power of Congress to regulate Interstate Commerce may be aided by appropriate and needful control of activities and agencies which, though intrastate, affect that commerce."

In *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 36-37 (1937), the Court declared:

"The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact all appropriate legislation 'for its protection or advancement' * * *; to adopt measures 'to promote its growth and insure its safety' * * *; 'to foster, protect, control and restrain'. * * * That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.'"

The following recent cases have determined some phases of intrastate activities that are properly subject to federal control. *Currin v. Wallace*, 306 U. S. 1 (1939); *Mulford v. Smith*, 307 U. S. 38 (1939); *United States v. Rock Royal Co-operative Inc.*, 307 U. S. 533 (1939); *United States v. Darby*, 312 U. S. 100 (1941); *United States v. Wrightwood Dairy Co.*, 315 U. S. 110 (1942).

The authority of Congress over goods which have moved in interstate has operated to prevent numerous acts to those goods: e. g., the imposition of discriminatory taxes, *Sonneborn v. Cureton* 262 U. S. 506 (1923); the requirement of label removal, *McDermott v. Wisconsin*, 228 U. S. 115 (1913); the receiving etc. of stolen motor vehicles, *Brooks v. United States*, 267 U. S. 432 (1925); the placing of restrictions on an importer in selling an article in convenient containers, *Baldwin v. Seeling*, 294 U. S. 511 (1935).

That Congress in enacting Section 301(k) of the Act intended to exercise its broad powers under the commerce clause is clearly expressed in the legislative history of the Act. In H. R. Rep. No. 2139, 75th Cong., (3rd Sess., 1938), submitted by the Committee on Interstate and Foreign Commerce to accompany S. 5, the bill which was enacted as the present Act, it was stated in speaking of Section 301:

"In order to extend the protection of consumers contemplated by the law to the full extent constitutionally possible, paragraph (k) has been inserted prohibiting the changing of labels so as to misbrand articles held for sale after interstate shipment."

One of the purposes of the Federal Food, Drug and Cosmetic Act is to "prevent the misuse of the facilities of interstate commerce in conveying to and placing before the consumer misbranded and adulterated articles of medicine or food". *McDermott v. Wisconsin*, 228 U. S. 115, 133 (1913); *United States v. Two Bags .... Poppy Seeds*, 147 F. (2d) 123, 127 (C. C. A. 6th, 1945). This purpose could not have been accomplished if the provision now being considered had been omitted. Its absence would have made it relatively simple, in many instances, to render nugatory the misbranding provisions of the Act

by simply shipping in interstate commerce properly labeled articles and misbranding them after the transportation had ended. Anticipating resort to such stratagem, whether as part of a scheme or not, Congress sought to prevent it by the enactment of subsection (k) which would preserve the integrity of labeling of an article that had been shipped in interstate commerce until it reached the consumer. "Any rule, . . . which is intended * * * to prevent the flow of commerce from working harm to the people of the nation, is within the competence of Congress. *Mulford v. Smith, supra.*

That federal authority extends far enough to control the labels on goods being offered for sale to consumers after shipment in interstate commerce was decided in *McDermott v. Wisconsin, supra.* In that case a Wisconsin statute required that certain syrups bear labels prescribed in the statute and none other. McDermott, a retail merchant in Wisconsin, received from Chicago a box containing 12 cans of syrup, which he placed on the shelves of his establishment for retail sale. The label of the syrup, when received by McDermott, complied with the Federal Food and Drugs Act of 1906, but did not comply with the state law. In order to meet the state law requirements, the labels of the cans would have had to be removed and new ones substituted. In holding that the state could not require the removal of the label that met the requirements of the federal law, the Court said at p. 133 in speaking of the state law:

"* * * to permit such regulation as is embodied in this statute is to permit a State to discredit and burden legitimate Federal regulations of interstate commerce, to destroy rights arising out of the Federal statutes which have accrued both to the Government and the shipper and to impair the effect of a Federal law which has been enacted under the Constitutional power of Congress over the subject."

By section 301(k) Congress has sought, not only to protect and foster interstate commerce, but also to prevent the impairment of the effect of other provisions of the Act. This it may lawfully do. "It is the law that when Congress properly enters the field of its authorized activity, it may not only adopt means necessary, but, in a like manner, means convenient to the exercise of its power." *Board of Trade v. Milligan*, 16 F. Supp. 859, 861. (W. D. Mo. 1936); aff'd 90 F. (2d) 855; cert. den. 302 U. S. 710 (1937).

In the McDermott case, the article that had been shipped in interstate commerce was subject to federal authority to the extent of prohibiting a state from interfering with its label. Such interference by the state impinged upon one of the lawful means that Congress had selected for the protection of the consumer. By section 301(k) Congress seeks to prevent individuals from interfering with labeling of articles that have been shipped in interstate commerce. Since federal authority can require the preservation of labels on articles that have been shipped in interstate commerce, notwithstanding attempted state regulation, it is a corollary that federal authority may require individuals to preserve such labels and punish acts that result in such articles being misbranded.

In *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935), cited and strongly relied on by the defendant, the Court drew the distinction between intrastate activities that directly affect interstate commerce and those that affect it indirectly. The Court pointed out (p. 546) that the precise line, in determining how far the federal government may go, "can be drawn only as individual cases arise". The facts in the *Schechter* case, in which attempted regulations of intrastate activities were held to be beyond federal power, are clearly distinguishable from those in the instant case. There a "Live Poultry Code", which had been promulgated under the Nation-

al Industrial Recovery Act, attempted to regulate almost every phase of the intrastate activities of the poultry business. These included hours, wages, labor conditions, number of employees, trade practices, etc. The regulations were general in nature and related to the conduct of the business, whether or not the commodity dealt with had been transported in interstate commerce. In holding that the regulations were invalid the Court recognized (p. 544) that it is the "effect upon interstate commerce" not "the source of the injury" which is the criterion of federal power. In the statute here assailed the very article on which the act was done which resulted in its misbranding must have moved in interstate commerce. To hold that Congress has no power to prohibit such wrongful acts would permit the use of the facilities of interstate commerce to place before the consumer misbranded goods. "The power to regulate interstate commerce includes the power to prohibit its use to facilitate wrongful and injurious acts and practices." *Bailey v. United States*, 74 F. (2d) 451 (C. C. A. 10, 1934).

An important Supreme Court pronouncement with respect to the Food and Drugs Act of 1906 appears in the dissenting opinion of Justice Holmes in *Hammer v. Dagenhart*, 247 U. S. 251 (1918). The majority opinion was recently expressly overruled by a unanimous Court in *United States v. Darby, supra*, where on page 115, the Court referred to "the powerful and now classic dissent of Mr. Justice Holmes". In his dissent in the *Dagenhart* case, Justice Holmes stated on page 279:

"The Pure Food and Drug Act which was sustained in Hipolite Egg Co. v. United States, 220 U. S. 45, with the intimation that 'no trade can be carried on between the States to which it (power of Congress to regulate commerce) does not extend', 57, applies not merely to articles that the changing opinions of the time condemn as in-

trinsically harmful but to others innocent in themselves, simply on the ground that the order for them was induced by a preliminary fraud. *Weeks v. United States*, 245 U. S. 618. It does not matter whether the supposed evil precedes or follows the transportation. It is enough that in the opinion of Congress the transportation encourages the evil."

Here Justice Holmes gave recognition to the proposition that in the Food and Drugs Act of 1906 Congress did not confine its regulation of interstate commerce in such merchandise to the period of transportation alone, but properly struck at evils intimately associated with such commerce, though they might arise prior or subsequent to the transportation.

By the statute here in question Congress has in effect declared that if the facilities of interstate commerce are used for the shipment of goods, no person may thereafter, while the goods are being held for sale, do any act with respect to the goods which misbrands them. The mischief, which the statute seeks to prevent, has a direct effect on interstate commerce. To hold that Congress may not prevent such acts would permit the facilities of interstate commerce to be used to the detriment of the public.

So far as the Court is aware, there are only two reported cases that deal with the interpretation of this provision of the law. One of these cases is *United States v. Lee*, 131 F. (2d) 464 (C. C. A. 7, 1942), an injunction proceeding under section 302 of the Act (21 U. S. C. 332) to restrain, among other things, violations of section 301(k). The defendant there caused circulars to be printed in which false claims were made for his drug products and after the goods were shipped in interstate commerce the drugs and circulars were displayed together which resulted in the goods being misbranded. The Circuit Court, in holding that this was a violation of section 301(k) which could be restrained, said (p. 466):

"It (the Federal Food, Drug and Cosmetic Act) was enacted to protect the public health and to prevent fraud, and it ought to be given a liberal construction. Consequently, we are impelled to the conclusion that misbranding is cognizable under the Act if it occurs while the articles are being held for sale."

The other case which deals with this provision of the law is *United States v. 7 Jugs .... Dr. Salsbury's Rakos*, 53 F. Supp. 746 (D. Minn., 1944), a seizure under the Act. The Court there commented as follows (p. 756):

"This Court does not in this proceeding propose to mark out the limits of Section 301(k). Seemingly, however, it was enacted by Congress under its authority to regulate activities affecting interstate commerce. See *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1. In referring to alteration, mutilation, destruction, obliteration, or removal of labels, this section at least suggests the possibility that what it contemplates is a lawful use by a drug of the facilities of interstate commerce followed by some activity which causes it to be misbranded."

By the Federal Food, Drug and Cosmetic Act, Congress has sought to prevent the use of facilities of interstate commerce in conveying to and placing before consumers adulterated and misbranded articles. That it may lawfully do this, the Court believes, is no longer open to question. Keeping within Constitutional limitation of authority Congress may determine for itself the means necessary to make its purpose effective. By section 301(k) Congress had exhibited the character of the means it deemed necessary to carry out its purpose, and the Court thinks it has kept within Constitutional bounds.

(2)

The plan of section 301 of the Act clearly demonstrates the purpose of Congress. Subsection (a) prohibits the introduction into interstate commerce of an article that is misbranded at the time introduction takes place; sub-section (b) prohibits the misbranding of an article in interstate commerce; sub-section (k) prohibits the doing of any act with respect to an article after shipment in interstate commerce and while held for sale, that results in the article being misbranded.

It is unnecessary in considering this case to determine whether or not the article on which the alleged acts were done were in interstate commerce at the time the misbranding took place. It might well be that in the instant case the article while on the shelf of the retailer was in interstate commerce. If this were so, the acts done might be acts of misbranding in interstate commerce, and a violation of Section 301(b). The situation set forth in subsection (k) "while such article is held for sale after shipment in interstate commerce", does not preclude the possibility that the article at the same time may be in interstate commerce. But, under section 301(k) it is sufficient to show interstate shipment of the article and the doing of the prohibited act while the article was held for sale. It is apparent that Congress intended to preserve the integrity of the labeling of an article that had been shipped in interstate commerce until it reached the consumer, even though the article was no longer in interstate commerce.

The information charges that the act of the defendant, in causing the removal, repacking, and disposal of the tablets, resulted in the drug being misbranded within the meaning of 21 U. S. C. 352(f)(1) and (2). These provisions are as follows:

"A drug or device shall be deemed to be misbranded—
(f) Unless its labeling bears (1) adequate directions for

use and (2) adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users: Provided, That where any requirement of clause (1) of this paragraph, as applied to any drug or device, is not necessary for the protection of the public health, the Administrator shall promulgate regulations exempting such drug or device from such requirement."

It will be observed from the allegations of the information that the bottle containing the tablets, which was shipped in interstate commerce, did not bear adequate directions for use but bore the so-called "prescription legend". The regulation promulgated under the proviso of 21 U. S. C. 352(f) exempted this article from bearing adequate directions for use. This regulation in effect at the time of the alleged violation,[2] 21 C. F. R. Cum. Sup. Sec. 2.106(b) provided, among other things that a shipment of a drug shall be exempt from bearing adequate directions for use if it is made for use exclusively by or on prescriptions of physicians and bears the "prescription legend". The exemption is to remain effective until the drug is dispensed upon and under labels bearing the directions for use specified in prescriptions of physicians. This regulation as it affects the present case would require the drug to be sold on a physician's prescription and to bear the directions for use specified in the prescription. The "prescription legend" is not a substitute for adequate directions for use.

The bottle containing the tablets of drug when shipped in interstate commerce, traveling under the exemption, was labeled to comply with the law. It is charged that the act of the defendant in causing the removal, repacking

[2] A new regulation with somewhat modified provisions concerning exemptions under this section became effective on October 10, 1945.

and disposal of the tablets of drug in a container bearing only the written matter "Sulfothiazal" or "Sulfathiazole" resulted in its misbranding.

It was strongly contended here by the defendant that the acts which are alleged to constitute the violation were not one of those particularly enumerated in the statute, viz: "Alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling." This argument is untenable for two reasons. First, such acts are in fact alteration or obliteration of part of the label, and second, such acts, if not one of those enumerated, is the doing of some other act, other than those enumerated, with respect to the drug.

The bottle label which was proper bore considerable printed matter, including the name of the drug "Sulfathiazole" and the "prescription-legend", and required warnings. Clearly, if part of the label had been obliterated, leaving only "Sulfathiazal", misbranding would have resulted. Likewise, if the article is repacked into a container which bears only the printed matter "Sulfathiazal", there is equally a violation as being a combination of obliteration and alteration of the label.

Apart from this, the language of the statute "or the doing of any other act with respect to a * * * drug", includes any other act other than those enumerated in the opening clause of sub-section (k). No restriction is made as to the character of the act prohibited, except that it must be "with respect to" the drug. Had it been the intention of Congress to prohibit acts upon the article itself, or to the original container, it would have been sufficient to proscribe any other act to the article. Instead, however, the more inclusive term "with respect to" was used. Not only are acts done to the article itself prohibited, but all acts falling within the larger category are prohibited by the statutory language. In *United States v. Lee, supra,* the Court held that displaying circulars which

contained false and misleading statements together with drugs that had been shipped in interstate commerce and resulted in the drugs being misbranded was cognizable under this section of the act.

The design of Congress "to extend the protection of consumers contemplated by the law to the full extent constitutionally possible" is clearly expressed in the legislative history. Congress in section 301(k) did not use any language that would indicate that "held for sale after shipment in interstate commerce" referred to the original consignee, or while the article was in original unbroken packages, unloaded, or unsold. Congress used the broad language "while * * * held for sale." In order to give effect to the purposes of the Act, the protection of the consumer, the prohibitions relating to the article must go along with it while it is being held for sale by anybody, whether the original interstate consignee, wholesaler, distributor, or retailer. The article in the hands of any dealer and until it reaches the ultimate consumer is being held for sale. This thought as it applied to producers was expressed by the Court in *Hipolite Egg Co. v. United States, supra*, where it was said:

"All articles, compound or single, not intended for consumption by the producer, are designed for sale, and, because they are, it is the concern of the law to have them pure."

Obviously, the defendant in this case, a retail druggist, who is charged with doing the prohibited acts, from the time he received the article until it was disposed of was holding it for sale. The buying of drugs and holding them for sale was part of his business. The language of the statute coupled with the statement from the legislative history, read in the light of the purposes of the Act, affords, in this Court's opinion, no room for doubt

that the acts charged are within the meaning and purpose of the statute.

The defendant in this case, as retail druggists generally do, obtained his supply from a distributor within the state. If section 301(k) is limited to a situation where the drugs which are being held for retail sale were received directly from outside the state, the protection of the public will be extensively curtailed. If retailers find that they can evade federal jurisdiction by purchasing drugs through local wholesalers, after receipt by the latter in the channels of interstate commerce, this provision of the act is nullified and the statute rendered partly ineffective. A statute should not be construed as to render it partly ineffective or inefficient or to cause public injury or inconvenience, if it can be construed in a way that will make it effective. *United States v. Powers*, 307 U. S. 214 (1939); *Bird v. United States*, 187 U. S. 118 (1902); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381 (1940).

The Supreme Court in *United States v. Antikamnia Chemical Co.*, 231 U. S. 654, 667 (1914) said of the Food and Drugs Act of 1906:

"The purpose of the law is the ever insistent consideration in its interpretation."

And in *United States v. Dotterweich, supra*, the Court said of the present Act:

"The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation, if it is to be treated as a working instrument of government and not merely as a collection of English words."

In construing section 301(k) the Court should be guided by the purposes of the Act, the intention of Congress therein evidenced, and seek to make that intention effectual. *United States v. Standard Downer Co.*, 274 U. S. 225 (1927); *Rogers v. Peck*, 199 U. S. 425 (1905). The Court should look to the policy of the legislation as a whole, the reason for its enactment and its antecedent history and give it an effect in accordance with its design and purpose, so that its purpose may not fail. *Ozawa v. United States*, 260 U. S. 178 (1922); *United States v. American Trucking Ass'ns*, 310 U. S. 534 (1940). Regard should also be had to the evils which called forth the statute (*Fasulo v. United States*, 272 U. S. 620 (1926)), and a construction should be adopted which serves to correct the evil and defeat the wrong it was its purpose to frustrate. *Bernier v. Bernier*, 147 U. S. 242 (1893); *Rhodes v. Iowa*. 170 U. S. 412 (1898).

The Federal Food, Drug and Cosmetic Act is a remedial statute, intended to protect the public health and pocket book, and should be liberally construed. *United States v. Dotterweich, supra; United States v. Two Bags .... Poppy Seeds, supra, United States v. 7 Jugs .... Dr. Salsbury's Rakos, supra; United States v. Research Laboratories*, 126 F. (2d) 42 (C. C. A. 9, 1945); *United States v. Commercial Creamery Co.*, 43 F. Supp. 714, (E. D. Wash., 1942).

So construing section 301(k) of the Act there can be no doubt that the acts of the defendant alleged in the information constitute violations of those provisions of the law.

The defendant's motion to dismiss will be Denied.

Ordered filed, this the 19 day of June, 1946.

T. HOYT DAVIS,
United States District Judge.

Filed June 20, 1946.

33 ORDER DENYING MOTION TO DISMISS.

The defendant's motion to dismiss the criminal information filed in the above stated case was orally argued before the Court by counsel for both sides, and written briefs were filed. The Court has carefully considered the questions involved and its conclusions are set forth in an opinion filed this date.

Whereupon, it is Ordered and Adjudged by the Court that the motion to dismiss be and the same is hereby Denied.

This the 19th day of June, 1946.

T. HOYT DAVIS,
United States District Judge.

Filed June 20, 1946.

Mr. Cowart:

Your Honor please, we are calling for trial before the Court without a jury the case of United States versus Jordan James Sullivan, trading as Sullivan's Pharmacy, Information No. 3688.

The Court:

Why not try it to a jury?

Mr. Cowart:

Mr. Hatcher specifically waives trial by jury and we request the Court to try it without a jury. As a matter of fact, it will be tried on stipulation.

The Court:

Well, if you have stipulated the facts. This is in that matter where I passed on the motion to dismiss.

Mr. Hatcher:
Yes, sir.

Mr. Cowart:
Mr. Hatcher has stipulated that he would stipulate that—

Mr. Hatcher:
Let me make that statement.

Mr. Cowart:
All right, make it for the record.

Mr. Hatcher:
Your Honor please, we are willing to stipulate—

The Court:
You mean you do stipulate?

Mr. Hatcher:
Yes, sir—that the defendant, Jordan James Sullivan, on or about December 13, 1944, caused to be sold 12 sulfothiazal tablets, to Joe P. Durham, in a box, which was labeled only "Sulfothiazal"; that immediately prior to the sale, the 12 tablets were removed from a bottle which had originally contained 1000 of such tablets, which was then on the shelf of defendant's drugstore in Columbus, Georgia; that said bottle of 1000 tablets was labeled in the manner set forth in the information; that said bottle had previously been purchased on or about September 29, 1944 by the defendant, from Abbott Laboratories in Atlanta, and had been shipped on or about that date from Atlanta, Georgia to Columbus, Georgia; that said bottle, along with a number of other like bottles, had previously between November 25, 1943 and March 15, 1944, been shipped in interstate commerce by Abbott Laboratories in Chicago, from Chicago, Illinois, to Atlanta, Georgia.

Mr. Cowart:

North Chicago, I believe that was.

Mr. Hatcher:

—North Chicago, Illinois, to Atlanta, Georgia. That is our stipulation, if the Court please.

Mr. Cowart:

Now, will you stipulate further that they were being held by this druggist on his shelves for sale, after such shipment? That is what the information states.

Mr. Hatcher:

I am willing to stipulate they were on his shelves and that he ran a retail drug-store in Columbus, Georgia, and that the 12 tablets were sold over the counter in said retail store in Columbus, Georgia.

Mr. Cowart:

That is all right. Now, that is in Count One. There is a second count there as to the purchase by another agent. It is exactly the same situation but a different purchase. I have the agents here and am in position to prove it; that is, just on the sale.

Mr. Hatcher:

I am willing to stipulate as to that count, as I stated. I had rather not stipulate as to this count. I am willing to stipulate as to the shipment.

Mr. Cowart:

All of it except the actual sale?

Mr. Hatcher:

Yes.

The Court:
What about the label on the second count?

Mr. Hatcher:
No, sir.

Mr. Cowart:
You stipulate only as to the interstate shipment of the bottle?

Mr. Hatcher:
Yes.

Mr. Cowart:
Then, I want to swear, if Your Honor please, Mr. Herbert McLeod, Jr. ..., Mr. Hatcher, there is one other thing in connection with that first count: Will you stipulate further that the man to whom the drug was sold did not have a prescription, Durham?

Mr. Hatcher:
No, sir, I am not willing to stipulate as to that.

Mr. Cowart:
I want Mr. Durham and Mr. McLeod to both hold up their right-hands.

(Two witnesses sworn.)

Mr. Cowart:
Do you have any witnesses?

Mr. Hatcher:
No.

Mr. Cowart:
Do you want our witnesses excluded?

Mr. Hatcher:
No.

37 MR. JOE P. DURHAM, witness sworn in behalf of the Government, testified on

Direct Examination.

By Mr. Cowart:

Q. Mr. Durham, are you a Food and Drug Inspector?

A. Yes, sir.

Q. Did you have occasion to come to Columbus on or about December 13, 1944, and visit Sullivan's Pharmacy, operated by Jordan James Sullivan here in Columbus?

A. Yes, sir.

Q. On that occasion did you make a purchase of 12 tablets of sulfothiazal drug from Mr. Sullivan?

A. No, sir, I made the purchase of sulfothiazal from Mr. Meadows, one of the pharmacists in Mr. Sullivan's drugstore.

Q. Do you have the drugs that you purchased?

A. Do I have them?

Q. Do you have the box that they were sold to you in?

A. No, sir, I have not.

Q. What was the labeling on the box that the tablets were in?

A. Sulfothiazal.

Q. Was there any other description on the box, other than that?

A. No, sir.

Q. Did you have a prescription?

A. No, sir.

Mr. Arnold:

Your Honor please, we move to exclude the evidence of the witness as to what was written on the box which

he claims the tablets were sold in, on the ground that the box itself would be the highest and best evidence.

Mr. Cowart:
He stipulated that, if Your Honor please.

The Court:
I understood that it was agreed that he sold it.

Mr. Arnold:
That was in the other count.

Mr. Hatcher:
Durham is in the first count? I thought it was McLeod. He says he bought them from another person.

Mr. Cowart:
From another druggist, that's right.

Mr. Hatcher:
I was understanding the first count was a sale made by Mr. Sullivan.

Mr. Cowart:
No, it was made by one of his druggists in the drug-store to this Joe P. Durham. Now, the second count may be the one where it was sold by Mr. Sullivan.

Mr. Hatcher:
Well, that is the one that I had reference to.

Mr. Cowart:
That is the one you were stipulating on?

Mr. Hatcher:
That's right.

Mr. Cowart:

We can stipulate what you stated as to the second count instead of the first count?

Mr. Hatcher:

That's right.

(Mr. Cowart):

Q. Mr. Durham, did you have a doctor's prescription calling for this drug?

Mr. Arnold:

Just a minute. As I understand it, we are now talking about the box that was sold by the pharmacist, is that correct?

Mr. Cowart:

No, we are talking about the box that was sold by the pharmacist to this Drug Inspector, not the original bottle, because there is a stipulation about the bottle containing the 1000 tablets.

Mr. Hatcher:

That's right.

Mr. Arnold:

No, I am talking about the box that this gentleman purchased, this particular box that he purchased. He purchased this from the pharmacist, did he not?

Mr. Cowart:

That's right.

Mr. Arnold:

Now, that is what I wish to object to, what was written on there because we have not stipulated anything as to that particular box.

Mr. Cowart:
That's correct.

Mr. Arnold:
We move to exclude that because he said he got the box and it is not here.

The Court:
Well, if he can account for it, I will permit him to do that.

(Mr. Cowart):
Q. Mr. Durham, did you get the tablets in a box or package, or how did they come?
A. In a box.
Q. What kind of box?
A. In a small white box, what we usually call a "pill box", about two inches by maybe half an inch.
Q. What did you do with the box?
A. I identified that with what we call sample number 64091-F, and put the date that I purchased it, 12-13-44, and my initials "J. P. D." on there. I officially wrapped that box with paper and put an official United States Government, Food and Drug, seal on that; and on that seal I again put the number, 64091-F, 12-13-44, Joe P. Durham; and delivered it to the Chief Chemist of the Food and Drug laboratory in Atlanta, Mr. A. M. Henry, on the 18th of December.
Q. And so far as you know, that is where it is now?
A. Yes, sir.
Q. Now, what was the labeling on that box, Mr. Durham?
A. I copied the labeling off on my collection report, written in pencil, the information I took off of the box, was the word "Sulfothiazal".
Q. How was that spelled?
A. Sulfathiozole, unless I am mistaken in it.

Q. Now Mr. Durham, was there any other direction or any other directions on the box other than the word "Sulfathiozole"?

A. Nothing else on the box.

Q. Until you put something else on there and that was your entries?

A. Until I put the sample number and my initials on it.

Q. How many tablets were contained in that box?

A. Twelve.

Q. Did you turn the tablets, along with the box, over to the chemist?

A. Yes, sir.

Q. Did you have a prescription from a doctor?

A. No, sir.

Q. Did you buy this medicine from the druggist without a prescription of any sort?

A. I did.

Q. Tell the Court just how you come about buying it. What did you say to him and what did he say to you?

A. Well, when I went in the store there was an elderly gentleman at the back that was sweeping the floor and I walked on back toward the back, and he asked me what he could do for me. I told him, "I would like to have about an ounce of Tincture of Mercresin, and a dozen sulfathiazole tablets." He went back into what we call the "prescription room", or another little room in the back part of the building; and came back in a minute or two and said he did not have the Tincture of Mercresin. I asked him if there was another drugstore in that vicinity. It was the first time I had been in that drugstore and the first time in that section of Columbus. And he said "No, there was not." He went back into the prescription room and in about a minute came back with this small box and handed it to me, and made the statement that that would clear up my throat. I had appar-

ently a little cold when I went in there but I didn't tell him what I wanted with the tablets or anything. I asked for a dozen sulfathiazole tablets. I do not know what he assumed. I asked him how much the tablets were and he said a dollar, I mean 75 cents. I gave him a dollar bill and he gave me back a quarter. I took the product and left the store and stopped under the light on the outside and wrote the sample number, the date and my initials on it.

Q. Did you ever any time tell him what you were going to use it for?

A. No, I did not.

Q. And you had no doctor's prescription for it?

A. I had no doctor's prescription.

Mr. Cowart:
He's with you.

Mr. Hatcher:
No questions.

42 MR. HERBERT McLEOD, JR., witness sworn in behalf of the Government, testified on

Direct Examination.

By Mr. Cowart:
Q. What is your name?

Mr. Hatcher:
Now, is that in reference to what we have stipulated?

Mr. Cowart:
This is the second count.

Mr. Hatcher:

We have stipulated as to that, except the prescription. We did not stipulate on that.

(Mr. Cowart):

Q. Mr. McLeod, did you on or about the 14th day of December go to the drugstore operated by Mr. Sullivan, known as Sullivan's Pharmacy, here in Columbus?

A. I did.

Q. At that time did you make any purchase of 12 sulfathiazole tablets?

A. I did.

Q. Did you at that time surrender to him a doctor's prescription, giving directions as to the use and number of tablets to be bought?

A. No, sir.

Q. Did you state to him what was your purpose in buying them, what you were going to use them for?

A. I did not.

Q. You bought them without any directions from a physician?

A. That's right.

Q. And without his knowledge of what you were going to use them for?

A. I am sure he did not have any way of knowing what I was going to use them for.

Q. Did Mr. Sullivan sell you those particular tablets? Just for the purpose of clearing this record here, did Mr. Sullivan sell you those tablets?

A. Yes, sir.

Q. The defendant on trial here?

A. Yes, sir.

Q. Did Mr. Sullivan know whether or not you were a Food and Drug Inspector at the time?

A. I am sure he did not because I had never seen him before.

Q. You did not tell him you were a Food and Drug Inspector?

A. No, sir.

Cross Examination.

By Mr. Madden Hatcher:

Q. This is Mr. McLeod?

A. Yes, sir.

Q. To refresh your recollection, Mr. McLeod, didn't you tell Mr. Sullivan that you were very familiar and knew all about sulfathiazole?

A. No, sir.

Q. You did not?

A. No, sir.

Q. You did not tell him that you wanted it for a cold?

A. No, sir.

Q. Mr. McLeod, did Mr. Sullivan, after making that sale to you and after you made known your official capacity, did he refuse to furnish on your request the name and address of the person from whom he purchased or received such articles?

A. He did. I asked for his invoice covering.

Q. And he gave it to you, didn't he?

A. No, sir, he said he kept his invoices at home.

Q. Well, didn't he go with you to his house?

A. What?

Q. Didn't he go with you to his home?

A. No, sir.

Q. He didn't go with you to his home?

A. I have never been to his home.

Q. He didn't tell you who he bought it from?

A. The bottle was labeled "Abbott", and he told me he didn't know where he bought it; that some time ago, about a year and a half ago, he bought a large quantity of tablets from a lot of different people, because he thought there was going to be a shortage.

Q. Well, did he refuse to furnish you on your request with the name of the person from whom he bought it?

A. Yes, sir.

Q. What did he say to you, please sir? What did you ask him and what did he say?

A. I said I would like to see the invoice covering this bottle. He said, "I don't have it." He said "I keep my invoices at home", and that was at night and he was apparently the only pharmacist there, and he didn't want to leave the store; and he said he would be there the next day. I went around there the next day but he never did go get the invoice.

Q. You didn't go and Mr. Durden didn't go out there?

A. Mr. who?

Q. Mr. Durham, I mean?

A. To his house?

Q. Yes.

A. I don't know whether Mr. Durham went to his house or not.

Q. Well, you all were working together in Columbus at the time?

A. Yes, sir.

Mr. Arnold:

Judge, would you permit me to ask him this?

Cross Examination.

By Mr. Arnold:

Q. You asked him where his invoices were?

A. Yes, sir.

Q. And he told you they were at home?

A. Yes, sir.

Q. He didn't refuse to tell you where he had gotten these articles, did he?

A. Well, not in an outright refusal, in that sense of the word, but he didn't have them.

Q. Well, he didn't refuse to tell you? He said he didn't know because he had the invoices at home, that is correct?

A. That's right.

Q. So, your statement then that he refused to tell you was a conclusion on your part, wasn't it?

A. I do not know that I stated that he refused.

Q. You do now state though that he did not refuse but simply stated his invoices were at home?

A. Yes, sir.

Q. And he could not furnish it to you at that time?

A. That's right.

Q. However, you looked on the bottle, didn't you?

A. Yes, sir.

Q. And you got the label on the bottle and that showed the manufacturer, didn't it?

A. Yes, sir.

Q. Who was the manufacturer?

A. Abbott Laboratories, North Chicago. In fact, I took the bottle.

Q. He did not then refuse to give you the name and address of the person from whom he purchased it, that is Mr. Sullivan, did he?

A. He didn't give it to me.

Q. He didn't refuse, did he?

A. Well, I asked him for it and I didn't get it.

Q. His explanation was, he had them at home?

A. Yes, sir.

Q. Did you ask him for any documents pertaining to the delivery of the sulfathiazole tablets that he himself bought? Did you ask him for any document?

A. The documents I asked for were the invoices and the freight records covering that shipment.

Q. What?

A. I asked to see the records covering that shipment. By records I meant the invoice from the distributor and the freight bill from the common carrier.

Q. That is all you asked for?

A. Yes, sir.

Q. What did he say about the common carrier records?

A. He didn't have it there. I do not remember whether he said he had one or not.

Q. So, the substance of it is, he said he would go out to his house with you next day and get them, didn't he?

A. Yes, sir.

Q. You didn't go with him, did you?

A. I do not remember going. I can look it up in my notebook. He said he would but I sure don't remember doing it. . . . No, I did not go out there with Mr. Sullivan.

Q. Now, you and Mr. Durham were working together, weren't you?

A. On some jobs, yes.

Q. On this job you were working together? You were sent down here to work the town together, weren't you?

A. I wouldn't say working together.

Q. Well, why were you here at the same time?

A. We are Food and Drug Inspectors and we have business down here in Columbus quite frequently.

Q. Did you come down together?

A. I believe we did.

Q. How did you come?

A. In a car.

Q. In a car?

A. Yes.

Q. Well, you were working the town together and you knew he was here for that purpose, didn't you?

A. For what purpose?

Q. For the purpose of investigating these druggists on sulfathiazole?

A. Yes, sir, I knew that.

Q. So, you were working together for the Food and Drug people, weren't you?

A. We were working for the Food and Drug Administration.

Q. Did you go back to Atlanta together?

A. Yes, sir.

Q. Did you compare notes on what you had done?

A. That's right.

Q. Did you stay at the hotel together?

A. Yes, sir.

Q. Have the same room?

A. Had what they call a suite. I had to sleep on a day-bed and they had the bed.

Q. Did you discuss with him what he had done and discuss with him what you had done?

A. Yes, sir, but we didn't actually go into any places together until after it was all over.

Q. Well, I know that.

A. Well, I thought that's what you meant by working together.

Q. Now, after you had gone around and purchased them, then you went back together, didn't you?

A. That's right.

Q. And asked for these documents, explained to them that you were Food and Drug Inspectors? Then, you went back and asked Mr. Sullivan for these documents that you are telling me about?

A. I asked him the same night that I bought the tablets.

Q. But you went back the next day?

A. Yes, I went back the next day.

Q. You were with Mr. Durham then, weren't you?

A. That I don't know.

Q. Did you go any place together?

A. Yes, sir.

Q. It was your practice to go together, wasn't it?

A. No.

Q. After it was all over, I mean, and you went back to ask for the documents or to tell them who you were?

A. I wouldn't say it was a practice.
Q. Well, you did it, didn't you?
A. Did what?
Q. If you will listen very carefully, I think you can get my question.

The Witness:
Your Honor, am I on trial here or Mr. Sullivan?

The Court:
No, sir.

Mr. Cowart:
I do not see the relevancy of this line of questioning.

The Court:
I thought there was a stipulation.

Mr. Arnold:
There was a stipulation but I am getting this to bring out the other part. I want to ask Mr. Durham.

Mr. Cowart:
I think you are confused on the men that went to his house.

Mr. Arnold:
Well, I was trying to show that they went together and that the act of one was really the act of the other.

The Court:
Well, that wouldn't follow.

Mr. Arnold:
I mean by that the act of the Administration.

51 MR. JOE P. DURHAM, witness sworn in behalf of the Government, being recalled by Defendant, testified further on

Cross Examination.

By Mr. Arnold:

Q. Mr. Durham, did you go to the house with Mr. Sullivan, his house?

A. Yes, sir.

Q. To get the documents?

A. Yes, sir.

Q. Did he give them to you?

A. I got what records he had.

Q. He did not refuse to give them to the Food and Drug Administration?

A. I will make this statement: That was about two weeks after Mr. McLeod was in Columbus. Mr. McLeod was on leave without pay over in Alabama and didn't know anything about it.

Q. What I am getting at though is that the documents that you asked for and all he had, he gave you, didn't he?

A. I may make this statement: I do not say that the documents that I asked for were given me, no. I don't know. There were documents given me in a box, in several boxes. They were scattered all over Mr. Sullivan's house in boxes, with newspapers, magazines and first one thing and another. You could not make head nor tail of any of them.

Q. But he gave you what he had?

A. He gave me that stuff.

Q. He gave you what he had?

A. He gave me that stuff and I went through it.

Q. What did you do with it?

A. I looked at it.

Q. Did you take any of it with you?

A. No, sir.

Q. Then, you were out there with him?

A. Yes, sir, he carried it down to the drugstore for me to go through, and then it was turned back over to him.

Q. Did those documents contain invoices?

A. They had a few invoices, had invoices, bills and letters, and just a general conglomeration of material.

Mr. Hatcher:

That is all.

Mr. Cowart:

That is all you have.

The Court:

I believe the venue was stipulated here in Columbus?

Mr. Cowart:

Yes, sir, it is here in Columbus.

Mr. Hatcher:

Yes, sir, it is here in Columbus, these cases.

Mr. Arnold:

If Your Honor please, there are just two points that I want to speak briefly about.

ARGUMENT.

The Court:

I spent a good deal of time on this matter. It was an intriguing question to me. I reached a definite conclusion that these acts charged here did constitute an offense under that Act, and that the Act was valid in that respect.

The Court:

Now the stipulation here and the evidence, in my opinion, if my theory of it is correct, does show this man

is guilty, if my theory of the Act and construction of it is correct. If I am wrong on it, why then he has not committed any offense, but that is my view about it; and, of course, I would hold him guilty under the stipulations and under the evidence here. Now, do you want to conclude the record now?

Mr. Hatcher:
Yes, sir.

The Court:
What did I give those others? I think I fined those others $250 and put them on probation.

Mr. Cowart:
They varied, if Your Honor please, from $200 to $500 and $750 was the highest.

Mr. Hatcher:
If the Court please, may I just make a motion for the record for an acquittal, for a judgment of acquittal, if that is necessary, just to preserve the point that the evidence is insufficient.

The Court:
Yes, and I overrule that motion and find the defendant guilty. . . . This man is still in the drug business?

Mr. Hatcher:
Yes, sir, and let me make this statement: This man has in effect been under probation ever since December 13, 1944 and I ask you to take that into consideration.

The Court:
Well, I will give him what I gave the others, as I remember, in his class. I will suspend the imposition of sentence

and put him on probation. I will let him pay a fine of $200 and serve two years on probation.

Mr. Roberts, Chief Probation Officer:
Is that a condition of probation?

The Court:
Upon the payment of a fine of $200. Now, about the supervision, I do not know that it is necessary for the Probation Officer to supervise him because the Food and Drug people will be inspecting him from time to time.

Mr. Arnold:
We would like to further complete the record by filing a notice of appeal and, if Your Honor would agree to it, we would like for you to let him pay the fine into the Court in lieu of bond, to be held subject to final disposition.

The Court:
In lieu of a bond?

Mr. Arnold:
Yes.

The Court:
Well, he could just put up the fine.

Mr. Cowart:
I think he has got to pay the fine prior to appealing or else make bond for it.

The Court:
If you pay the fine, I think that might interrupt your appeal.

Mr. Arnold:

We do not want to pay the fine.

The Court:

If he wants to put up $200 cash bond in lieu of another bond, not as payment of the fine, but as a bond, he can post a cash bond of $200 and that will stay the fine. When you file your notice of appeal and give your bond, the execution of the sentence is suspended until the matter is finally determined. I would really be glad for you fellows to test it out because it affects druggists all over the country. If I am right about it, it ought to be established and if I am wrong about it, it ought to be established.

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55 JUDGMENT

The dft., Jordan James Sullivan, having pled not guilty and having waived a trial by jury and the same being tried by the Court by agreement of the U. S. and the dft. and after hearing the evidence, I find the defendant guilty, this the 2nd day of Sept., 1946.

T. HOYT DAVIS,
U. S. Judge.

District Court of the United States, Middle District of Georgia, Columbus Division.

United States of America,
vs.
Jordan James Sullivan, an individual, trading as Sullivan's Pharmacy.

Indictment No. .....

Information No. 3688.

Crime: Vio. Federal Food, Drug & Cosmetic Act.

The defendant having been convicted and it having been made to appear to the satisfaction of the Court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved by suspending the imposition of sentence and by placing the defendant upon probation under the provisions of the Probation Act, approved March 4, 1925, it is

Considered and Adjudged that the imposition of sentence be and the same is hereby suspended, and that defendant be and is hereby placed upon probation under the provisions of said Act and upon the followin terms and conditions:

1. Defendant shall pay to the United States at this time $200.00 as a condition of probation.

2. The probation period shall be for Two (2) years.

3. Defendant shall report as directed by the Probation Officer, Charles E. Roberts, Macon, Georgia.

4. During the maximum period for which defendant might now be sentenced, or during the period of probation, whichever is greater, the conduct and behavior of defendant shall be good in all respects, and he shall refrain from violation of any and all State and Federal penal laws, and from any activity, conduct, or behavior tending toward any such violation.

5. Service of said sentence shall be without supervision.

In open Court, this 2nd day of September, 1946.

T. HOYT DAVIS,
United States Judge.

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57 NOTICE OF APPEAL.

Filed Sept. 3, 1946.

In the District Court of the United States within and for the Middle District of Georgia, Columbus Division.

United States of America,
vs.
Jordan James Sullivan, an individual, trading as Sullivan's Pharmacy.

Information No. 3688.

September Term, 1945.

1. Name and address of appellant: Jordan James Sullivan, 1411 Wynnton Road, Columbus, Georgia.

2. Name and address of appellant's attorney: Robert M. Arnold, Columbus, Georgia; and J. Madden Hatcher, Columbus, Georgia.

3. Offense: Misbranding in violation of Section 331 (k) of Title 21 of the United States Code.

4. Concise statement of judgment and sentence: Judgment of conviction, dated September 2, 1946, imposing a fine of Two Hundred Dollars ($200.00) upon appellant and placing appellant upon probation for a term of two (2) years.

5. Name of institution where now confined, if not on bail: Appellant not confined.

The above-named appellant hereby appeals to the United States Circuit Court of Appeals for the Fifth Cicruit from the above-stated judgment.

Dated: September 3, 1946.

ROBERT M. ARNOLD,
J. MADDEN HATCHER,
Attorneys for Appellant.

Filed September 3, 1946.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON THE APPEAL.

58 (Title Omitted.)

Comes now Jordan James Sullivan, the appellant, by and through his attorneys, Robert M. Arnold and J. Mad-

den Hatcher, and hereby states that he intends to rely on the appeal on the following points:

1. The allegations of said information are insufficient as a matter of law to constitute any offense against any of the laws of the United States of America and particularly Section 331 (k) of Title 21 of the United States Code.

2. The evidence was insufficient as a matter of law to sustain the conviction of the appellant of any offense against any of the laws of the United States of America and partciularly Section 331 (k) of Title 21 of the United States Code.

3. The two (2) over-the-counter retail sales, each of twelve (12) Sulfathiazole tablets, made by the appellant at his retail drugstore in Columbus, Georgia, were in intrastate commerce and did not and could not have any direct or substantial effect on interstate commerce.

4. Congress has no power under the commerce clause of the Constitution to regulate the intrastate over-the-counter retail sale of a drug which has come to rest within the state after shipment in interstate commerce unless such sale directly and substantially affects interstate commerce.

5. Properly construed, Sections 331 (k), 352 (f) (1) and 352 (f) (2) of Title 21 of the United States Code only apply to misbranding in interstate commerce.

6. Under Section 333 (c) (1) of Title 21 of the United States Code, it was necessary for the Government to allege and prove that the appellant acted in bad faith or refused to furnish on request the name and address of the

person from whom he purchased or received the drug in interstate commerce and copies of all documents, if any there were, pertaining to the delivery of the drug to him.

7. The evidence affirmatively shows that appellant acted in good faith in selling and delivering said Sulfathiazole tablets and that he did not refuse to furnish on request of an officer or employee duly designated by the administrator, the name and address of the person from whom he purchased or received such drug and copies of all documents that he had pertaining to the delivery of said drug to him.

8. Section 331 (k) of Title 21 of the United States Code and particularly the language "or the doing of any other act with respect to a drug . . . if such act is done while such article is held for sale after shipment in interstate commerce and results in such article being misbranded" is too vague, indefinite and uncertain to be enforcible as a criminal statute and to sustain a conviction of appellant for having made the two (2) retail sales as described in the information for the reason that such language does not adequately inform appellant that such sales will make him subject to the criminal penalties of the act.

9. If Section 331 (k) of Title 21 of the United States Code is construed as applying to the alleged acts of this appellant, then said section is unconstitutional, null and void, and in violation of the Tenth Amendment to the Constitution of the United States of America, which provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people", in that said section is beyond the legislative power of the Congress and is an invasion of the reserved police powers of the several States.

This 18 day of September, 1946.

(S.) ROBERT M. ARNOLD,

(S.) J. MADDEN HATCHER,

Attorneys for Appellant, Jordan James Sullivan.

Filed September 18, 1946.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

60 (Title Omitted.)

Comes now the appellant, Jordan James Sullivan, by and through his attorneys, Robert M. Arnold and J. Madden Hatcher, and hereby designates the following portions of the record, proceedings and evidence to be contained in the record on appeal:

1. The Information No. 3688, dated December 31, 1945.

2. The appellant's Motion to Dismiss said Information, the Order of the District Court, dated June 19, 1946, denying appellant's Motion to Dismiss and the Opinion of the Court, of the same date.

3. The Reporter's Transcript of the Stipulations, Proceedings and Evidence at the trial of appellant.

4. The Judgment and Sentence of the Court, dated September 2, 1946.

5. Appellant's Notice of Appeal, dated September 3, 1946.

6. This Designation by appellant of the Contents of the Record on Appeal.

7. Appellant's Statement of the Points on which he intends to Rely on the Appeal.

This 18th day of September, 1946.

(S.) ROBERT M. ARNOLD,
(S.) J. MADDEN HATCHER,
Attorneys for the Appellant,
Jordan James Sullivan.

Filed September 18, 1946.

61 CLERK'S CERTIFICATE.

In the District Court of the United States, Middle District of Georgia—Columbus Division.

Jordan James Sullivan, an individual, trading as Sullivan's Pharmacy, Appellant,
vs. Criminal No. 3688.
United States of America, Appellee.

United States of America,
Middle District of Georgia.

I, GEORGE F. WHITE, Clerk of the District Court of the United States in and for the Middle District of Georgia, do hereby certify that the foregoing and attached 61 pages contain a true, full, complete and correct copy of the original record and all proceedings had in the above stated cause, as specified in the designation of contents of record on appeal of counsel herein and as the same remains of record and on file in the Clerk's Office of the said District Court at Columbus, Georgia.

In Witness Whereof, I have hereunto set my hand and the official seal of the said District Court at Macon, Georgia, this 27th day of September, 1946.

GEORGE F. WHITE,
(Seal) Clerk, United States District Court, Middle District of Georgia,
By WALTER F. DOYLE,
(Walter F. Doyle),
Deput Clerk.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and submission

Extract from the Minutes of April 21st, 1947

No. 11774

JORDAN JAMES SULLIVAN, TRADING AS SULLIVAN'S PHARMACY

v.

UNITED STATES OF AMERICA

On this day this cause was called, and, after argument by R. M. Arnold, Esq., and J. Madden Hatcher, Esq., for appellant, and Vincent A. Kleinfeld, Esq., Attorney, Department of Justice, for appellee, was submitted to the Court.

Opinion of the court filed

May 12, 1947

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 11774

JORDAN JAMES SULLIVAN, TRADING AS SULLIVAN'S PHARMACY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for Middle District of Georgia

(May 12, 1947)

Before SIBLEY, MCCORD, and LEE, Circuit Judges

SIBLEY, Circuit Judge: Sullivan, a local retail merchant in Columbus, Georgia, was convicted under the Federal Food, Drug, and Cosmetics Act, 52 Stats. 1040, Sect. 301, (c) and (k), 21 U. S. C. A. § 331 (c) and (k), for selling to two federal inspectors two

lots of twelve tablets each of sulfathiazole taken from a bottle on the shelves of his drug store which had contained 1,000 tablets. The facts as alleged in the information and stipulated or proven on the trial are these: Between Nov. 25, 1943, and March 15, 1944, Abbott Laboratories, doing business in North Chicago, Illinois, shipped in interstate commerce to Abbott Laboratories, at Atlanta, Georgia, a number of boxes containing bottles of drugs, one of them being this bottle of 1,000 tablets of sulfathiazole, which was duly labeled as such, with a caution that they are to be used only by or on the prescription of a physician, and with the name and Chicago address of Abbott Laboratories. This bottle so labeled was on Sept. 29, 1944, in Atlanta sold to Sullivan, and by him transferred in intrastate commerce to his pharmacy in Columbus, and placed on his shelves for retail sales to customers. On Dec. 13, 1944, the two lots of twelve tablets each were taken from the bottle, placed in pasteboard pill boxes, with only the word sulfathiazole (slightly misspelled) on them, and sold to the federal inspectors. The label on the bottle was not defaced or changed, and the bottle was seen and afterwards taken in charge by the inspectors. A motion to dismiss the information as not charging a federal crime, and one for a judgment of acquittal because none was proved, were overruled and this appeal taken.

The general constitutionality of the federal Act under the commerce clause of the Constitution is admitted. The contentions are that the Act is not intended to operate on retail sales over the counter after interstate commerce has ended, by one who was not the importer; that the language is not clear enough to make criminals of such sellers; and that if construed to apply to them the Act is to that extent beyond the power of Congress.

It will be noted that the only interstate commerce here involved is the transportation of bottles of drugs in boxes from Chicago to Atlanta at least nine months before the sales here in question. The boxes came to rest in Atlanta and were opened by the importer, Abbott Laboratories, and the bottles were put in their stock of drugs in Atlanta for sale. Over six months thereafter Sullivan bought one bottle, which is conceded to have been duly labeled, and put it into his stock of drugs at Columbus for retail sales, where the bottle stayed for three more months. If the criminal provisions relied on apply here, they apply to all intrastate sales of imported drugs after any number of intermediate sales within the State and after any lapse of time; and not only to such sales of drugs, but also to similar retail sales of foods, devices and cosmetics, for all these are equally covered by these provisions of the Act. We are not able to conclude that the Act is to be so construed

as to bring within these penal provisions most of the sales in all drug stores, beauty parlors, barber shops and retail grocery stores in the United States.

The general purpose of the Act is declared in its simple title: "An Act to prohibit the movement in interstate commerce of adulterated and misbranded foods, drugs, devices and cosmetics, and for other purposes." Section 301 (c) prohibits (under penalty by Section 303), "The receipt in interstate commerce of any food, drug, device or cosmetic that is adulterated or misbranded, and the proffered delivery thereof for pay or otherwise." Sullivan clearly did not receive in interstate commerce any misbranded drug, nor did he proffer delivery of any in interstate commerce. A moderately strict construction of this penal provision would confine it to shippers and to importers in interstate commerce, and proffers of sale by the latter. Sullivan was a party to intrastate sales only. Moreover since this bottle was at all times duly labeled and not misbranded, no one violated this provision by receiving or proffering delivery of it.

Section 301 (k) prohibits "The alteration, mutilation, destruction, obliteration or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug device or cosmetic, if such act is done while such article is held for sale after shipment in interstate commerce and results in such article being misbranded." The labeling here was not removed or mutilated; but an act was done with respect to the drug, towit, the removal of some of it from the labeled bottle and the placing of it in a box not sufficiently labeled under the Act, after shipment in interstate commerce and while the drug was held for sale, so that this portion of the drug became misbranded. Therefore in their broadest possible sense these words may include what happened. But we are of opinion that they ought not to be taken so broadly, but held to apply only to the holding for the first sale by the importer after interstate shipment. Since importation by merchants of all merchandise is for the very purpose of sale, the importation, as has always been held, remains incomplete till its purpose is thus realized. Brown vs. Maryland, 12 Wheat. 419. The words of Section (k), "held for sale after shipment in interstate commerce," naturally refer to this first sale by the merchant importer. It was this sale which was involved in McDermott vs. Wisconsin, 228 U. S. 115, and in Baldwin vs. Seelig, 294 U. S. 511, much relied on by the government. We do not doubt, however, that the United States can prohibit the destruction of the labeling under which interstate commerce occurred, by anyone at any time, in order to preserve the evidence of what was done during

the interstate movement, as is fairly held in the McDermott case cited; but here this evidence was never meddled with, but went unaltered into the hands of the inspectors, and it shows a correct labeling. These main provisions of subsection (k) were fully complied with. The attempt here made is to extend subsection (k) so as to make criminal all retail sales from the interstate package, though made clearly in intrastate commerce, unless the label on the interstate package which has been broken be reproduced on the retail package. We believe no grocer or druggist thus breaking an interstate package for a retail sale has understood this was necessary, and it is said this case is the first effort to apply the federal Act in this way. If the "holding for sale" is held to refer to all would-be sellers no matter where or when or in what quantities, of all foods and drugs and cosmetics which at some time had moved in interstate commerce, the field of enforcement of the Act will be multiplied many times. The reason urged for so expanding it, towit, the protection of ultimate consumers, only makes another difficulty; for while Congress may regulate interstate commerce to any extent and almost for any purpose it thinks proper, this extended application would be really a direct regulation for police purposes of what is plainly intrastate commerce, which is the peculiar province of the State.

And the State of Georgia has not neglected her duty. Title 42 of the Georgia Code deals with the subject of selling and labeling foods, drugs and toilet articles, with several cooperative references to the federal laws and regulations, as in Sect. 42–110, 42–111; and 42–802, 42–806. Sections 42–701 and ff. regulate the dispensing of poisons, this legislation dating back to the year 1876. Sections 42–101 and ff. embody comprehensive laws on the subject of foods and drugs passed in 1906 and 1908. The Uniform Narcotic Drugs Act of 1935 is found in Sections 42–801 and ff. The Dangerous Drug Act of 1939 is in Sections 42–708 and ff. The last expressly covers the derivatives and compounds of sulfanilamide, and the label on the bottle here in controversy indicates that sulfathiazole is such, so that this Georgia Act applies to these sales, and Sullivan appears to have violated it here. It would seem the federal inspectors should have reported them to the Georgia inspectors. It is probable that other States have similar laws, reducing the need for Congress to interfere thus in intrastate commerce, if it has the power.

In passing this Act Congress in its title indicated that its main and direct concern was with "the movement in interstate commerce." Until that movement is complete and the importer has sold his original packages the State cannot interfere. Congress

regulated what the Constitution directly authorizes. There is no indication of any intention to regulate intrastate commerce because of any burdensome effect on interstate commerce. The talismanic expression "Affecting interstate commerce" is not used, as in the National Labor Relations Act passed shortly before. In interpreting and applying those words in National Labor Relations Board vs. Jones and Laughlin Steel Corp., 301 U. S. 1, the court was careful to point out the rule of construction of statutes that a construction will not be adopted that is of doubtful consitutionality, in this very matter of federal intrusion upon the domain of the States, saying at page 30: "We have repeatedly held that as between two possible constructions of a statute by one of which it would be unconstitutional and the other valid, our plain duty is to adopt that which will save the Act. Even to avoid a serious doubt the rule is the same (citing numerous cases.)"[1] Also in Federal Trade Commission vs. Bunte Bros., 312 U. S. 349, we read: "The construction of Sect. 5 urged by the Commission would give the federal agency control over myriads of local businesses in matters heretofore traditionally left to custom or local law. * * * An inroad upon local conditions and local standards of such farreaching import as involved here ought to await a clearer mandate from Congress." Much more ought unambigous and clear words to be required when statutes creating criminal offenses are for construction. United States vs. Wiltberger, 5 Wheat. 76; United States vs. Harris, 177 U. S. 305; Kraus vs. United States, 327 U. S. 614.

The purpose of this Act being to regulate "movement in interstate commerce" of foods, drugs and cosmetics, and the general purpose of subsection (k) being to prohibit mutilation of the labeling on the packages which so moved, we do not find the proposed application of the ejusdem generis words "Any other act" plain enough to make criminals of retail grocers and druggists who did not import but who break and sell intrastate from the imported packages without mutilating the labeling.[2] We thus find it unnecessary to determine the constitutionality of the federal regulation of intrastate sales as here contended for, by denying that doubtful construction.

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[1] Sliechter Poultry Corporation vs. United States, 295 U. S. 495, though not exactly in point, is enough to raise serious doubt in this case.

[2] Armour and Co. vs. Dakoto, 240 U. S. 510, and Weigle vs. Curtice Bros. Co., 248 U. S. 285, held that retail sales from broken interstate packages were not governed by the Federal Food and Drugs Act then in force but by the State law, partly for constitutional reasons; but the present Act differs enough to make these decisions probably not controlling here. In United States vs. Dotterweich, 320 U. S. 277, the shipment of the repacked drugs was in interstate commerce and was prosecuted under Section 301 (a), and the construction of (k) was not involved at all.

The judgment is reversed with direction to acquit the defendant below.

Judgment reversed.

Judgment

Extract from the Minutes of May 12th, 1947

No. 11774

JORDAN JAMES SULLIVAN, TRADING AS SULLIVAN'S PHARMACY

v.

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Middle District of Georgia, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed with direction to acquit the defendant below.

Clerk's Certificate

United States of America

United States Circuit Court of Appeals, Fifth Circuit

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 58 to 67 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 11774, wherein Jordan James Sullivan, trading as Sullivan's Pharmacy, is appellant, and United States of America is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 57 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 3rd day of June A. D. 1947.

[SEAL]

(S) OAKLEY F. DODD,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

U. S. GOVERNMENT PRINTING OFFICE, 1947

Supreme Court of the United States

No. 121, October Term, 1947

Order allowing certiorari

Filed October 13, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1947